88-1104

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

PAUL GIANNINI AND DOUGLAS VOIGHT,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT FOR CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-QUESTION PRESENTED FOR REVIEW

The "question" presented by the Commonwealth was not actually before the trial court because (1) the police only had a suspicion that they were observing ongoing criminal conduct; and (2) the defendants were not procecuted primarily due to what the police had observed prior to entry, but with what was subsequently found in a separate bedroom they shared after the police pretextually claimed they were making a routine security search of the entire residence. Furthermore, as discussed in the Brief in Opposition to Petition for Writ for Certiorari to the Supreme Court of the United States, other critical questions are also involved here that were decided adversely to the Commonwealth.

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REASONS FOR DENYING THE WRIT

Even if the Commonwealth of Pennsylvania is correct that there is some confusion among the lower courts in their interpretation of the "inadvertence" requirement of the plain view doctrine as established in Coolidge v. New Hampshire, 403 U.S. 443, 470, 91 S. Ct. 2022, 2040, 29 L. Ed. 2d 564, 585 (1971), this present case is an inappropriate vehicle for resolving the problem for a number of significant reasons:

(1) Probable cause did not exist for the police to obtain a warrant for the original entry into the dwelling where defendants resided. The tip from the previously "unencountered" informant that the residents "looked like they were using drugs," supplemented by the observations of a police officer, who

was relatively inexperienced in narcotic investigation, did not meet the "totality of the circumstances" requirement of Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, reh. denied, 463 U.S. 1237, 104 S. Ct. 23, 77 L. Ed. 2d 1453 (1983). Through binoculars from a residence next door, a police officer testified he saw what he and another officer thought were "a pipe and a packet of rolling papers," and, later, he saw an individual "pouring a white powder" on what he thought was an electronic scale. No doubt the officer was suspicious, but suspicion does not rise to the level of probable cause.

(2) Even if probable cause existed for the police to obtain a warrant to arrest the person observed by them or to search the immediate area where they observed the individual, the police chose to enter this residence without a

warrant, arrest the individual observed and search the entire house including the separate and private bedroom shared by the defendants, who were not observed by the police or present when the police were in the residence. No adequate showing was made of exigent circumstances, such as the likely destruction of evidence or departure of the observed individual, that would justify the failure of the police to obtain a warrant.

(3) Even if the warrantless entry was constitutionally permissible, it was improperly effected, because the officers did not "knock and announce" their presence. No exigent circumstances existed to justify this failure either. See Commonwealth v. Eiliff, 300 Pa. Super 423, 446 A.2d 927 (1982); Commonwealth v. Beard, 282 Pa. Super. 583, 423 A.2d 398 (1980).

(4) The search incident to the arrest went far beyond the permissible scope allowed in Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, (1969), reh. denied, 396 U.S. 869, 90 S. Ct. 36, 24 L. Ed. 2d 124 (1969). Officers conducted a general search thoughout the entire residence and entered the separate and private bedroom of the defendants, and the separate and private bedroom of another tenant as well, all of whom were residing there along with the individual the police had observed and arrested upon entry. Although no one other than the suspect arrested at the door was thought by the police to be in the building, and the police never articulated any potential danger they though imperiled them, this

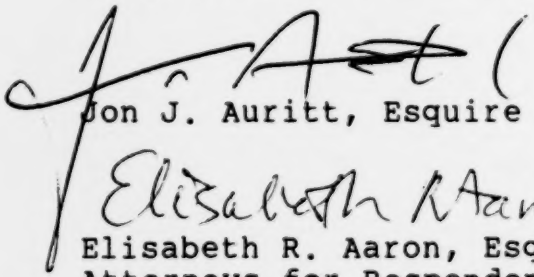
room-by-room search was speciously rationalized by the police as a routine security measure when it was obviously a purposeful illegal search for drugs and related contraband.

(5) The observations made by the police when they were illegally in defendants' bedroom looking around then became the basis the police used to obtain a search warrant (the affidavit for which was phrased in unspecific and conclusionary language) to seize drug paraphenalia from defendants' bedroom for which defendants were ultimately arrested and which was eventually and properly surpressed.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petitioner for Writ of Certiorari be denied.

Respectfully submitted,



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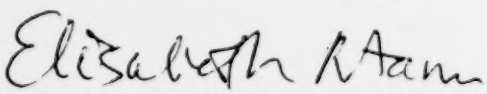

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